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No. 97-1639

In the Supreme Court of the United States

OCTOBER TERM, 1997

ROBERT D. SPRAGUE, ET AL., PETITIONERS

v.

GENERAL MOTORS CORPORATION, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Applying this Court's precedents construing ERISA and legal principles recognized by all other circuits, the court of appeals determined as a matter of fact that plaintiffs failed to sustain their burden of proof that General Motors Corporation promised to provide vested and unchangeable medical benefits to its retirees. The court of appeals also determined that the class alleged in this case failed to meet the prerequisites of Fed. R. Civ. P. 23(a) because of fundamental factual variations in the situations of the putative class members.

The questions presented are as follows:

1. Whether a purported class of plaintiff retirees satisfies the typicality and commonality standards of Rule 23(a) when the class members retired at different times and places over a period of 20 years, obtained differing formal and informal plan summaries, and received varying oral communications necessitating individualized proof at trial.

2. Whether an employer that has reserved its statutory right to amend its medical plan in formal plan documents distributed to employees, repeatedly exercised that right, and accurately described the current terms of its medical plan in written and oral communications is entitled under ERISA to modify the medical plan to increase copayments and deductibles required of plan participants.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, General Motors Corporation advises the Court that the following is a list of GM's non-wholly-owned subsidiaries.

Asset Leasing GMbH
Carus Grundstucks-Vermietungsgesellschaft mbH & Co.
General Motors GmbH & Co. OHG
Opel-Automobilwerk Eisenach-PKW GmbH
Auto Cable Industries (Pty) Limited
Convesco Vehicle Sales GmbH
Contro Toonico Herramental, S.A. de C.V.
Packard Electric Hebi Co., Limited
Packard Electric Bai Cheng Co., Limited
Delphi Italia Automotive Systems S.r.l.
Delphi Italia Service Center S.r.l.
DRB s.a./n.v.
Opel France S.A.
ENCI S.A.R.L.
Texton P.L.C.
Delphi Harrison
Delphi L'EM Argentina S.A.
Reinshagen Tournai S.A.
GM Ovonic L.L.C.
Banque Opel
General Acceptance (Thailand) Ltd.
Holden National Leasing Limited
GM Finance HB
OPEL Leasinggesellschaft mbH
Polbank, S.A.
P.T. GMAC Lippo Finance
General Motors de Argentina S.A.
Beijing Wanyuan GM Automotive Electronic Control Co., Ltd.
Hubei Delphi Automotive Generator, Co., Ltd.
Saginaw Norinco Lingyun Drive Shaft Co., Ltd.
Zhejiang Delphi Asia-Pacific Brake Co. Ltd.
General Motors Colmotores, S.A.
IBC Vehicles Limited
Millbrook Pension Management Ltd.

RULE 29.6 STATEMENT-Continued

DIRECTTV Enterprises, Inc.
IBC Vehicles (Distribution) Limited
GM-Saab Communication GmbH
Packard CTA Pty. Ltd.
Packard Electric Systems Samara Cable Company
PT General Motors Buana Indonesia
P.T. Packard Kabelindo Murni Indonesia
Radiodores Richard, S.A.

In addition, General Motors has recently acquired an interest in PanAmSat Corporation.

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STATEMENT

In this purported class action, plaintiffs, retired salaried employees of General Motors Corporation, claimed that GM violated the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, by modifying its medical plan to require plaintiffs to contribute to the cost of their medical care through increased copayments and deductibles. The Sixth Circuit, sitting en banc, determined that plaintiffs failed to present any evidence that GM ever promised to provide vested and unchangeable medical benefits. To the contrary, the evidence showed that GM repeatedly and unambiguously reserved its right to amend its medical plan in formal plan documents and summary booklets and certificates given to employees over a period of 20 years. That fact-bound determination, which rests on legal principles previously announced by this Court, and which reflects no disagreement with the law recognized in any other circuit, is plainly unworthy of further review.

Both before and after the plan amendments at issue in this litigation, GM maintained a medical plan of undisputed high quality. In the words of the district court, members of the plaintiff class "conceded that, even after the 1988 changes, they continue to enjoy a good health care program." Pet. App. 119a. When faced with exploding health care costs, GM did not terminate or drastically scale back its plan; instead, it continued to pay for most of the medical expenses incurred by plan participants, while also creating incentives for the rational use of limited health care resources. Plaintiffs nonetheless asserted in the courts below that—unlike tens of thousands of salaried GM employees and other retirees—they alone had an entitlement to unchangeable medical benefits for the rest of their lives, and that none of the costs of those benefits could be charged to them. The Sixth Circuit correctly rejected these claims on the ground that employers are "free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995).

1. The plan documents.

Based on its review of the voluminous record in this case, the en banc court of appeals affirmed the district court's ruling that "the plan unambiguously reserved GM's right to amend or terminate the plan." Pet. App. 3a-4a & n.2, 13a, 17a-18a, 233a-

236a. From its inception in 1964, GM's medical program was described in virtually all plan documents as subject to change. Before GM became self-insured, the company provided basic health care coverage for active employees and retirees through group medical insurance. The insurance certificates—which were distributed to "each covered person" (Pet. App. 3a, 227a; C.A. App. 194, 629-649, 1952; Tr. 65-74 XII(B))—stated unequivocally that the insurance was not "paid-up," and that GM "reserves the right to modify, revoke, suspend, terminate, or change the Plan, in whole or in part, at any time." C.A. App. 1955-2024, 2247. The underlying insurance policies and riders, which were made available to all employees (*id.* at 643, 1759, 1828, 1839, 1869, 1884, 1936), provided that "all insurance hereunder shall automatically cease immediately upon the discontinuance of this Policy" (*id.* at 1947-1955); the policies could be terminated upon GM's written notice. *Ibid.*

When GM became self-insured in 1985, its "plan expressly stated that '[a]ny rate of payment by the enrollee and any other terms and conditions of the Program may be changed at any time by the Corporation.'" Pet. App. 19a n.10. This statement made it abundantly clear that GM did not waive or relinquish the right Congress gave all employers under ERISA to amend or alter an employee welfare plan. Extrinsic evidence confirmed that GM at all times intended to preserve its right to amend the plan and never intended to vest medical benefits at any particular level. C.A. App. 836, 862, 868-869; VIII(B) Tr. 28-29; Pet. App. 199a. In the words of the en banc court, "the district court found, and we agree, that all versions [of the medical plan] clearly reserved to GM the right of amendment or termination." Pet. App. 3a-4a n.2.

2. The summary plan descriptions.

Over a period of two decades, and commencing long before any of the plaintiff class members retired, GM distributed hundreds of thousands of summary booklets and summary plan descriptions, which described the then-existing terms of its medical plan and reiterated the company's right to make plan amendments. As the Sixth Circuit explained (Pet. App. 27a), "most of the summary plan descriptions issued to the plaintiffs over the years unambiguously reserved to GM the right to amend or terminate the plan." In summary booklets issued in 1965, 1968, 1971, 1977,

1980, and 1985, GM made clear that the company "reserves the right to modify, revoke, suspend, terminate, or change the Program, in whole or in part, at any time"; that "GM health care coverages have been changed from time to time through the years and are subject to change in the future"; and that GM "reserves the right to amend, change or terminate" the plan. Pet. App. 5a; C.A. App. 1355, 1419, 1710, 1745, 1768, 2004, 2247, 1821, 1849, 1860, 1897, 1907, 1938. The two SPDs distributed in 1985 to both active employees and retirees exemplify these reservations. Each stated, beginning on its very first page in bold italicized print, that the company reserves the right to "amend, change, or terminate the Plans"—a warning repeated five different times. C.A. App. 1355, 1419, 1897, 1907, 1938. Only three of the 11 summary booklets omitted this language, and those documents pointedly stated that the "[a]ctual governing provisions and specific exclusions are contained in the applicable benefit certificates." *Id.* at 1245, 1249, 1255, 1276, 1299, 1307, 1773, 1783, 1788, 1800, 1828. As explained above, the insurance certificates, distributed to all covered employees, expressly reserved GM's right to modify or terminate the plan.

The district court accordingly found that, in these summary booklets, "GM unambiguously reserved its right to change the plan." Pet. App. 233a-236a. It also found that "GM employees were generally put on notice of GM's right to modify its health care plan." *Id.* at 234a n.7. Undisputed testimony and documentary evidence confirmed that before any of the plaintiffs retired and throughout the time period relevant to this litigation, both active employees and retirees received notice from the plan documents made available to them and the certificates and summary booklets actually distributed to them. *E.g.*, Pet. App. 144a, 158a-160a, 163a, 168a, 173a, 177a-179a; C.A. App. 740-742, 745-746, 750, 753-755, 844, 855-857, 861-862, 871-872, 2233-2234, 2235-2236, 2237-2238. Only a handful of retirees testified at trial in this case, but they repeatedly acknowledged receiving warnings of GM's right to amend before retirement and many admitted to actually reading the warning language. C.A. App. 391-A, 392, 400, 404-405, 407, 715-716, 724, 735, 777-779, 790, 807, 845-846, 862, 2184, 2194. In short, as the court of appeals observed, GM had a "clearly-stated right to amend—a right contained in the plan to which the plaintiffs had access and in many of the summaries they

were given" (Pet. App. 27a), a right reiterated "many times" throughout the period at issue in this litigation (*id.* at 29a).

3. GM's continuous amendment of the plan.

As the summary booklets showed on their face, GM's medical plan changed fundamentally over the years. The evolving plan contained numerous requirements for copayments, deductibles, premium contributions, and capped or excluded medical expenses. *E.g.*, C.A. App. 1366-1375, 632-640; Pet. App. 125a-127a. Employees therefore shared the cost of medical care in many ways; employee contributions and other terms frequently changed; and no one ever suggested that GM lacked the right to make those changes. Pet. App. 125a-127a; C.A. App. 1249-1255, 1301-1304, 1366-1367, 1722, 1738-1739.

From time to time, GM both expanded medical coverage and reduced benefits or added charges. For example, beginning in 1964, GM required deductibles and copayments for x-rays, electrocardiograms, and cancer treatments. Pet. App. 125a. Beginning in 1969, GM required copayments for prescription drugs, an amount raised twice prior to the plan changes challenged in this suit. *Id.* at 126a. When GM added dental coverage in 1974, it also required copayments ranging from 15% to 50%. *Ibid.* Likewise, GM's vision care coverage, added in 1977, required copayments that varied over time. *Ibid.* Beginning in 1985, employees who sought traditional fee for service medical treatment had to obtain prior approval for services or pay deductibles and copayments. C.A. App. 1366, 1908. Employees electing health care benefits for visits to doctors' offices were required to subscribe to "comprehensive" medical coverage, which always required premium payments, deductibles and copayments. Pet. App. 227a.

In response to dramatically increasing health care costs, which nearly tripled between 1975 and 1985 (C.A. App. 2227), GM announced a further modification of its health care program effective in 1988. This change required participants who elected certain coverage options to pay deductibles and make copayments. Those charges could be avoided, however, by electing HMO coverage. C.A. App. 2029-2032; Pet. App. 230a-231a n.4. These requirements brought the GM plan into line with health care programs across the nation that have made increasing use of

deductibles and copayments to improve efficiency and conserve limited health care resources. At the same time that these new charges were imposed for certain options, GM expanded medical coverage in several respects and voluntarily raised retirement income benefits. Pet. App. 128a n.6. GM also added hospice care, increased dental and mental health coverages, and enlarged coverages for prescription drugs and medical equipment. *Ibid.* The 1988 changes thus did not terminate the plan; to the contrary, the plan remains one of the most generous health care plans in the nation. Plaintiffs were required to make only modest contributions typically required of health care plan beneficiaries today. *Id.* at 8a.

4. Plaintiffs' claims.

Plaintiffs—salaried employees who retired between 1974 and 1988 either as general or early retirees—brought suit under ERISA to block GM's 1988 plan amendments, claiming that GM's action violated the terms of the plan, breached contractual duties, and violated principles of estoppel and fiduciary duty. The main thrust of each claim was that GM had bound itself to provide retirees and their spouses with vested health coverage for life, entirely at GM's expense, and thus that the GM medical plan could never be changed in any manner that increased charges to participants.

In making these extravagant claims, the general retirees seized on statements in the summary plan descriptions which confirmed that participation in the program would continue after retirement and (in contrast to retiree life insurance) would not automatically terminate at a particular age. The summary booklets describing current plan terms stated variously that, under the existing medical plan, "you may keep your basic hospital, surgical and medical expense coverages in effect[;] * * * GM will pay the full monthly premium or subscription charge for such coverages," or that participants would receive "coverages" at "Corporation expense for your lifetime." Pet. App. 4a. The early retirees also cited similar descriptions of existing plan terms made orally or in informal written summaries. *Id.* at 7a-8a. The early retirees claimed that these informal statements constituted promises that were integrated into "statements of acceptance" used to memorialize their retirement. *Id.* at 24a-25a.

There was no dispute at trial that GM's statements were fully accurate descriptions of the terms of the GM plan as it then

existed—terms that remained in effect for some 20 years. It was also undisputed that retirees were never told that GM relinquished its reserved right to amend the plan, a right set forth repeatedly in the formal plan documents and in summaries distributed to employees. Reviewing all of GM's formal and informal statements, which said nothing about the level of future copayments or deductibles, the court of appeals determined that "[n]either the GM plan itself nor any of the various summaries of the plan states or even implies that the plaintiffs' benefits were vested." Pet. App. 22a-23a. "GM never told the plaintiffs that their benefits were vested or fully paid-up." *Id.* at 27a. GM's statements were "undeniably true under the terms of GM's then-existing plan," and constituted "accurate representations of its current program." *Id.* at 29a, 31a.

Far from showing that GM had "given out * * * inaccurate information" (Pet. App. 31a), GM's informal written summaries often repeated the warning about future plan changes and put the retirees "on notice of GM's right to modify its health care plan" (*id.* at 9a, 234a n.7). For example, when "a small number of early retirees explicitly asked GM representatives about future changes to health care benefits," the answers "were accurate—benefits could be changed in the future" (*id.* at 7a-8a). Some prospective retirees received informal summaries reiterating that GM reserved the right to "amend, change or terminate the Programs described" (*id.* at 144a, 182a). Others were told orally that the speaker "could only attest to what was currently in effect" and that "benefits were subject to change." *Id.* at 144a. See also *ibid.* (prospective retirees were told "very specifically [that] benefits were subject to change"); *id.* at 163a-164a ("Because General Motors reserves the right to amend or terminate its benefit plans and to amend its employment policies, your actual benefit entitlement may be affected by future plan amendments"); *id.* at 173a, 179a ("The [benefit] summary is not intended to and does not create any contractual obligations. General Motors reserves the right to amend or terminate programs"); *id.* at 178a (on those occasions when prospective retirees asked whether health care coverages could be changed, "[t]he response generally went along the vein that it could be changed, either improved or some, you know, items taken away").

5. The decisions below.

The district court rejected the claims of the general retirees, holding that "[b]ecause GM's general plan documents unambiguously set forth GM's right to modify health care coverages * * * these documents do not establish GM's agreement or 'private design' to vest any particular level of health care benefits upon retirement." Pet. App. 236a.[1] However, the district court subsequently certified a class of early retirees and ruled in their favor, concluding that various informal statements made over a period of 20 years were sufficient to override GM's reserved right to amend and to vest medical benefits for this group of retirees. *Id.* at 219a. The district court's holding in favor of the early retirees shattered what had been GM's uniform health care program for salaried employees, froze health care at retirement for a favored class, and created numerous subgroups of beneficiaries who were entitled to differing levels of benefits. The court issued an injunction that precluded GM from increasing copayments or deductibles under its health care plan.

The Sixth Circuit, sitting en banc, affirmed the district court's ruling rejecting the claims of the general retirees, but reversed the ruling in favor of the early retirees. Pet. App. 17a-32a. The court of appeals held that the district court had abused its discretion in certifying a class of early retirees because of fundamental differences in the factual predicate for each retiree's claim. *Id.* at 11a-17a. Applying legal principles announced in this Court's recent opinions, the court of appeals further held that the individual early retirees lacked valid claims on the merits under ERISA. Based on its detailed review of the record, the court determined that GM had reserved its right to amend its medical plan and never promised to vest medical benefits at any particular level. The court also

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[1] The district court's ruling rejecting the claims of the general retirees came after extensive document discovery and the deposition of GM officials most knowledgeable about the GM plan. C.A. App. 36-50, 157-172, 696-703. Before ruling, the district court received detailed evidence concerning the evolution of the plan and the charges imposed on plan participants through periodic amendments. *Id.* at 628-649. Following the presentation of a complete trial record, the district court reaffirmed its decision rejecting the claims of the general retirees. Pet. App. 89a.

determined that the early retirees were on notice of GM's right to amend and had not been misled by the company's accurate descriptions of existing plan terms. *Id.* at 23a-31a.

Eight of the 13 members of the en banc court joined in the majority opinion written by Judge Nelson. Two more judges, Judges Lively and Merritt, partially concurred in that opinion, concluding that the general retirees had no valid cause of action. Judge Merritt also concurred in the majority holding that the early retirees could not maintain a class action. Pet. App. 33a-37a. The dissenting opinion of Judge Martin (joined by two other judges) disagreed with the majority not on the interpretation of judicial precedent, but rather on the proper characterization of the facts of this particular record. *Id.* at 38a-50a. On February 4, 1998, after reviewing extensive argument from plaintiffs concerning the certworthiness of this case, Justice Stevens declined to grant a stay of mandate or extend the lower court's stay.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit's Decision Applies Settled Law To The Facts Of This Particular Case And Does Not Conflict With Prior Decisions Of This Court Or Any Other Circuit.

This case received thorough consideration from the Sixth Circuit over a three-year period. In the end, the majority of the en banc court disagreed with the dissenting judges not over legal principles but over the interpretation of the unique facts presented by a voluminous record. The majority determined that plaintiffs had adduced *no* evidence that GM made promises to vest medical benefits at any particular level; to the contrary, the company repeatedly and unambiguously notified its workforce of its statutory right to amend. Pet. App. 5a, 8a, 20a. "Neither the GM plan itself nor any of the various summaries of the plan states or even implies that the plaintiffs' benefits were vested." *Id.* at 22a-23a. The dissenting judges, overlooking evidence demonstrating the pervasiveness of GM's reservations of its right to amend, characterized GM's reservations as "rather tepid" or "inconsistent," and simply assumed that GM made "promises" of unchanging medical benefits. *Id.* at 44a-45a. The dissenting judges nowhere responded to the majority's demonstration that GM's statements were *descriptive*, not promissory, and were "undeniably

true under the terms of GM's then-existing plan." *Id.* at 29a. Wholly apart from the merits of this debate, this is a clear occasion for application of the restriction stated in this Court's Rule 10: certiorari should not be granted to review purportedly "erroneous factual findings." This case-specific determination lacks general precedential significance no matter how labeled or characterized. See *NLRB* v. *Hendricks County Elec. Corp.*, 454 U.S. 170, 176 n.8 (1981) ("we are presented primarily with a question of fact, which does not merit Court review"); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts").

Whether particular statements by an employer (considered in context) amount to promises of vested benefits, and whether employees could "reasonably rely" on those statements given the employer's reservation of rights, are questions that are wholly case-specific. Whether the record demonstrates sufficient commonality and typicality among class members to justify class certification under Rule 23 is likewise a question dependent on the particular circumstances of the case. As indicated by the many precedents cited in the opinion of the Sixth Circuit, this Court repeatedly has denied certiorari when presented with substantially identical fact-bound claims brought under ERISA. See Pet. App. 18a-31a, citing *Musto* v. *American Gen. Corp.*, 861 F.2d 897 (6th Cir. 1988), cert. denied, 490 U.S. 1020 (1989); *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir.), cert. denied, 510 U.S. 870 (1993); *Gable* v. *Sweetheart Cup Co.*, 35 F.3d 851 (4th Cir. 1994), cert. denied, 514 U.S. 1057 (1995); *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), cert. denied, 514 U.S. 1050 (1995); *Borst* v. *Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), cert. denied, 514 U.S. 1066 (1995); and *Pocchia* v. *NYNEX Corp.*, 81 F.3d 275 (2d Cir.), cert. denied, 117 S. Ct. 302 (1996). There is no reason for a different disposition here.

It is equally clear that the Sixth Circuit did not disregard principles announced in this Court's prior decisions. To the contrary, the court of appeals carefully applied this Court's latest ERISA rulings. See Pet. App. 12a, 18a, 23a, 27a-31a, discussing and applying *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73 (1995); *Lockheed Corp.* v. *Spink*, 116 S. Ct. 1783 (1996); *Varity Corp.* v. *Howe*, 116 S. Ct. 1065 (1996); *Inter-Modal Rail*

Employees Ass'n v. *Atchison, Topeka & Santa Fe Ry.*, 117 S. Ct. 1513 (1997); and *Nachman Corp.* v. *PBGC*, 446 U.S. 359 (1980). The court below also faithfully applied the class action criteria set forth in *General Tel. Co.* v. *Falcon*, 457 U.S. 147, 161 (1982). Given this Court's recent pronouncements under ERISA, there is no practical reason for a grant of certiorari. As Rule 10 makes clear, the Court will not grant certiorari when an asserted error consists of "the misapplication of a properly stated rule of law."

Moreover, the Sixth Circuit's decision does not conflict with any ruling of another court of appeals. To the contrary, the en banc opinion cited rulings of federal courts of appeals from across the country for the black-letter legal principles relied on here. *The Sixth Circuit did not express disagreement with a single decision from another jurisdiction.* Pet. App. 13a-32a. As explained on pages 15-24, *infra*, there is not the slightest basis in decisions from other circuits to conclude that another court of appeals would have decided *this* case differently. This Court will have numerous opportunities in the future to address issues of vesting. It should not attempt to do so in the absence of a genuine conflict among the circuits that illuminates competing considerations of law and policy.

It would be especially inappropriate to do so in a case such as this one, which was correctly decided on its own record. Ten judges agreed with the trial judge that the general retirees have no valid claim. Nine judges concurred in the fact-bound holding that the class action was improper. The en banc court's rejection of the claims of the individual plaintiffs was also correct, based on settled precedent that the dissent did not dispute. The court of appeals did not question the availability of causes of action for breach of an ERISA plan, breach of contract, breach of fiduciary duty, and estoppel, but found that plaintiffs failed to adduce evidence sufficient to support any such cause of action. Pet. App. 18a-31a. There is no reasonable likelihood that a majority of this Court would disagree with these fact-bound rulings. It is particularly unlikely that this Court would disagree with the class action ruling in this case, which substantially curtails its practical importance.

Finally, the decision of the court below is a fair and reasonable disposition of this protracted litigation. As a humane alternative to layoffs, GM offered voluntary early retirement to employ-

ees with generous pension benefits. After retirement, both early and general retirees continued to have access to a company-financed health care plan of undisputed quality. The modest co-payments and deductibles they now pay, for some medical plan options, are typical of those paid by almost all medical plan beneficiaries today.[2] As the court of appeals explained, retirees were not misled by GM's conduct. GM reserved its statutory right to amend long before any of the plaintiffs retired, and repeated that disclosure throughout the time period at issue in this litigation. Employees knew from firsthand experience that GM's plan was a living, changing health care program and that GM could (and frequently did) amend it to add charges and payments. Significantly, GM's adoption of copayments and deductibles has "not deterred acceptance of early retirement. In fact we have had record retirements in the last two years." C.A. App. 808.

In these circumstances, plaintiffs' lawsuit amounted to a game of "gotcha"—a demand for *free and unchangeable* medical benefits unavailable to any other GM employee or retiree on the theory that "the company did not tell the early retirees at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change." Pet. App. 29a. But Congress did not require employers "to begin every communication to plan participants with a caveat." *Ibid.* If accepted by federal courts, such opportunistic claims "would create disincentives for employers to offer benefits in the first place. Such a result is not in the interests of employees generally and it is certainly not compatible with the goals of ERISA." *Id.* at 25a.[3]

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[2] When GM made its plan changes in 1988, 95% of company-sponsored plans had deductibles and 90% had copayments. Rice, *Containing Health Care Costs in the United States*, 49 Med. Care Rev. 19, 26 (Spr. 1992). Copayments and deductibles can be avoided completely by enrolling in GM's HMO program. Pet. App. 127a, 230a-231a n.4.

[3] As the Second Circuit observed in *Moore* v. *Metropolitan Life Insurance Co.*, 856 F.2d 488, 492 (2d Cir. 1988): "Automatic vesting was rejected [by Congress] because the costs of [health] plans are subject to fluctuating and unpredictable variables. * * * [M]edical insurance must take account of inflation, changes in medical practice and technology, and increases in the costs of treatment independent of inflation. These

II. The Sixth Circuit Applied Law Recognized In All Circuits When Resolving The Fact-Bound Class Action Claims In This Case.

Plaintiffs contend (Pet. 20-21) that the Sixth Circuit erred in applying Rule 23(a) to the facts of this particular case. As the court's opinion shows on its face, however, the Sixth Circuit faithfully adhered to this Court's precedents interpreting Rule 23(a) as well as settled law articulated in numerous prior appellate decisions. Pet. App. 11a-17a. The court of appeals correctly concluded that the variations in the situations of individual class members, and the diversity of factual and legal issues raised by their claims, precluded entry of a class-wide injunction.

The early retirees based their claims to class-wide, unchanging healthcare benefits on literally thousands of oral and written statements made by hundreds of different GM officials, often in one-on-one conversations, at more than 160 GM plants across the country over a period of nearly 20 years. Under governing contract law, each such claim required individualized consideration to "determine the scope of [any] promise with some precision," as well as to rule on GM's defenses. *Farnsworth on Contracts* § 3.1 at 161, § 3.27 at 353-355 (1990). These contract claims could not be resolved in plaintiffs' favor without examining the specific oral and written statements made to each retiree. Plaintiffs' breach of fiduciary duty and estoppel claims also required individualized evaluation, as the Sixth Circuit explained. Pet. App. 15a, 31a.

In addition, the class members included persons who received and read statements expressly reserving GM's right to amend the health plan (Pet. App. 144a, 166a); persons who were personally informed that the health benefits were not vested (*id.* at 144a); persons who did not sign the statements of acceptance that plaintiffs claim embody their contracts (*id.* at 12a); persons who

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unstable variables prevent accurate predictions of future needs and costs." Accordingly, "Congress chose not to impose vesting requirements on welfare benefit plans for fear that placing such a burden on employers would inhibit the establishment of such plans." *Adams* v. *Avondale Indus. Inc.*, 905 F.2d 943, 947 (6th Cir.) (discussing legislative history), cert. denied, 498 U.S. 984 (1990), cited with approval in *Curtiss-Wright*, 514 U.S. at 78.

received different summary booklets over a 20-year period, most of which expressly reserved GM's right to amend the plan (pp. 2-4, *supra*); and persons who took or agreed to take early retirement *after* GM announced the changes in its health care program in 1987 (Pet. App. 124a). The descriptions of the health benefits they received were extraordinarily diverse, ranging from general predictions that health care would "be continued," or would be "like" that given to "active employees," to statements that health care would not change "drastically" or that "coverages" would be financed by GM. *Id.* at 151a-152a, 160a-164a, 167a-168a, 173a-179a.

As this Court held in *General Tel. Co.* v. *Falcon*, 457 U.S. 147 (1982), Rule 23(a) forbids certification in such a case. In *Falcon*, this Court reversed certification of an employee class action alleging that the employer had adopted a general "practice" that resulted in unlawful discrimination. The class failed to meet the "commonality" and "typicality" requirements of Rule 23(a) because plaintiffs' claims required individualized consideration. Class litigation is improper, the Court held, unless "questions of law [are] applicable in the same manner to each member of the class" and class members "suffer the same injury." *Id.* at 155-156. Accord *Lewis* v. *Casey*, 116 S. Ct. 2174, 2184 & n.7 (1996) (recognizing that it is improper to grant a class-wide remedy ranging beyond the claims of individual plaintiffs where other class members have not been shown to have suffered the same injury); see also *id.* at 2202 (Souter, Ginsburg, and Breyer, JJ., concurring). The Sixth Circuit properly rejected plaintiffs' effort to litigate discrepant individual issues on a class basis, in reliance on the testimony of a handful of people—each of whom recited widely different facts and circumstances.

Plaintiffs nonetheless contend (Pet. 19-20) that the Sixth Circuit impermissibly applied the "predominance" test of Rule 23(b)(3) to the district court's Rule 23(b)(2) certification of a class of early retirees. That is pure fantasy. The Sixth Circuit did not even refer to "predominance" or Rule 23(b)(3), limiting its analysis to the threshold requirements of commonality and typicality set forth in Rule 23(a).

As the court of appeals noted, the district court certified the early retiree class only after its decision in *Sprague I*, and "[t]he

issues that remained after *Sprague I* were anything but common." Pet. App. 13a. Resolution of those issues rested on the early retirees' theories of bilateral contract, fiduciary duty, and estoppel, the resolution of which, as discussed above, would require highly individualized proofs. Plaintiffs' complaint (Pet. 20) that the court of appeals "focused almost exclusively on differences among individual classmembers," instead of on "legal and factual issues common to the class," simply disputes the court's well-supported determination (Pet. App. 14a-15a) that there *were* no such common issues but only "myriad variations" of individual circumstances.

The Sixth Circuit's ruling that plaintiffs did not satisfy Rule 23(a)'s threshold requirements for a class action is unexceptionable and fully consistent with this Court's recent statement, in *Amchem Prods., Inc.* v. *Windsor*, 117 S. Ct. 2231, 2248 (1997), that both subdivisions (a) and (b) of Rule 23 preclude a class action where the proposed class lacks "sufficient unity." It is also consistent with the rejection of similar ERISA class action claims by other courts of appeals. *E.g.*, *Retired Chicago Police Ass'n* v. *City of Chicago*, 7 F.3d 584, 596-598 & n.17 (7th Cir. 1993) (refusing to allow class litigation of vesting claims that depended on extra-plan communications that varied over time and were not "standardized"); *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945, 953 (8th Cir. 1994) ("estoppel * * * must be applied with factual precision and therefore is not a suitable basis for class-wide relief"); *Hudson* v. *Delta Air Lines*, 90 F.3d 451, 457 (11th Cir. 1996) (holding that contract and fiduciary duty claims under ERISA may not be litigated in class format when based on "individualized" informal statements that are "not susceptible to class-wide proof"); *Frahm* v. *Equitable Life Assurance Soc'y*, 137 F.3d 955, 956-957 (7th Cir. 1998) (following the Sixth Circuit's ruling here and rejecting "person-specific" class claims of early retirees under ERISA).

Plaintiffs' contention (Pet. 21) that the Sixth Circuit's decision conflicts with *Forbush* v. *J.C. Penney Co.*, 994 F.2d 1101 (5th Cir. 1993), and *Adamson* v. *Bowen*, 855 F.2d 668 (10th Cir. 1988), is frivolous. In *Forbush*, a single question of law determined the defendant's liability to all plaintiffs—whether "Penney's general practice of overestimating social security benefits" complied with the applicable statute. Individual "calculations" were required only to ascertain the "awards" of damages that would be

made to class members. 994 F.2d at 1106. The court also stressed that it was addressing the use of class litigation only "at the outset," at "this [preliminary] stage of the litigation." *Ibid.* Similarly, in *Adamson*, the class claim was that a federal agency adopted a uniform "policy of nonacquiescence" with regard to Tenth Circuit law on the proper weight to be given to physicians' reports in social security disability hearings. 855 F.2d at 675. Obviously, those decisions provide no support for entry of a class-wide injunction sustaining the claims of tens of thousands of class members on the merits, where liability could not be imposed without individualized evaluation.

III. The Sixth Circuit's Factual Determination That GM Never Promised To Vest Benefits Does Not Conflict With The Law In Any Other Circuit.

In challenging the Sixth Circuit's holding that GM's plan documents and SPDs do not vest benefits, plaintiffs begin with the improbable assertion that the ruling below conflicts with no fewer than 22 decisions of other courts of appeals. Pet. 12-15 & n.3. On the face of it, however, this contention is insupportable. Although plaintiffs called to the Sixth Circuit's attention virtually all of the vesting cases now relied upon in the petition, the en banc majority nowhere suggested that it meant to reject the rule of any other court of appeals. Equally significant, the *dissenting* judges below did not regard plaintiffs' authority from other circuits to be apposite; none of the dissenting opinions cited *any* of the purportedly conflicting decisions offered by plaintiffs, or indicated that the majority's rule differed from the approach taken by any other court of appeals. Like the dog that did not bark, this silence is a clear tip-off that plaintiffs' contention lacks substance.

In fact, plaintiffs' assertion of a conflict is premised on a plain misstatement of the record. Plaintiffs begin with the assumption that the SPDs here made "express promises" of free and unchangeable health care (Pet. 12), and the petition proceeds to discuss cases that deal with the rules applicable to such promises. ***But the foundation for the holding below was the case-specific finding that GM made no such promises.*** The court of appeals thus expressly concluded that "[n]either the GM plan itself nor any of the various summaries of the plan states or even implies that the plaintiffs' benefits were vested." Pet. App. 22a-23a. See *id.* at 20a

(the SPDs simply described "the terms of the current plan"); *id.* at 21a (citation omitted) ("'[t]o read this summary as saying that the plan can never be changed in such a way as to mandate retiree contributions for continued medical coverage is to read into the summary something its authors did not put there (a promise to provide lifetime "paid up" medical insurance)'"); *id.* at 27a ("GM never told the plaintiffs that their benefits were vested or fully paid-up").[4] Given this factual determination, the first question presented in the petition—whether "express promises of lifetime health care in ERISA SPDs vest benefits at retirement" (Pet. i)—simply is not raised by this case. And assertions of a conflict necessarily are spurious because, on this record, plaintiffs would not prevail in *any* circuit.[5]

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[4] This fact finding plainly was correct. Read in context, the "lifetime" SPD language relied upon by plaintiffs (at Pet. 5) did nothing more than accurately describe the health plan *as it existed at the time of the SPDs' distribution*. The first sentence of the health plan descriptions in the 1977 and 1980 versions of "Your GM Benefits"—the SPDs upon which plaintiffs principally rely—described the health benefits *then available* both to active employees and to retirees (see C.A. App. 1249, 1301); there can be no suggestion that this description promised either group that those benefits would not be changed in the future. The "lifetime" sentence upon which plaintiffs focus appeared in the subsequent portion of the SPD dealing with retirement, under the subhead "Other Benefit Program Coverages—After Retirement." C.A. App. 1317-1318, 1263-1264. This section described the effect of retirement on a workers' participation in *all* of GM's welfare and pension programs. In this setting, the sentence seized upon by plaintiffs obviously meant only that retirement would not terminate entitlement to health plan benefits; it did not suggest that those benefits—made available on the same terms to active and retired employees—never would be changed for retirees. See *Gable* v. *Sweetheart Cup, Inc.*, 35 F.3d 851, 857-858 (4th Cir. 1994) ("[b]enefit descriptions cannot be translated into guarantees that benefits will never be altered").

[5] Plaintiffs are wrong in contending (at Pet. 15) that other courts have held that "phraseology" similar to that in GM's SPDs gives rise to vested rights. Two of the decisions that plaintiffs cite for this proposition, *Diehl* v. *Twin Disc, Inc.*, 102 F.3d 301 (7th Cir. 1996), and *Stewart* v. *KHD Deutz of America Corp.*, 980 F.2d 698 (11th Cir. 1993), involve the interpretation of collective bargaining agreements; as we explain below

The Sixth Circuit did not, as plaintiffs suggest, adopt a rigid formula to determine whether benefits are vested. Pet. 16. To the contrary, the Sixth Circuit recognized that "[e]mployers may vest welfare benefits if they choose to do so" (Pet. App. 18a), that an "employer may contractually cede its freedom" to change its plan (*ibid.*), that an employer may vest benefits either "by agreement or by private design" (*ibid.*), that "statements in a summary plan are binding * * * if such statements conflict with those in the plan itself" (*id.* at 19a), and that ERISA plaintiffs can have viable causes of action for breach of plan terms, breach of contract, promissory or equitable estoppel, or deviation from fiduciary duty (*id.* at 23a-31a). The court of appeals did not give a limited definition to any of these causes of action, nor did it narrowly circumscribe the kind of evidence that would suffice to support vesting.[6] The court's fact-bound resolution of this particular case does not conflict with the law in any other jurisdiction.

1. In nevertheless trying to establish disarray in the lower courts, plaintiffs first contend that "the Sixth Circuit's holding that the presence of both lifetime and reservation of rights language in the same SPD renders the plan unambiguous against vesting ([Pet. App.] 20a) is squarely in conflict with the decisions of other circuits." Pet. 12-13. The question of how to reconcile provisions in an SPD that both promise unchanging lifetime benefits and

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(at 18-19, 22), such cases are inapposite here. In the remaining decision relied upon by plaintiffs, *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), the employer did not deny that the plan documents could be read to vest benefits; instead, the employer relied "exclusively" on its reservation-of-rights provision. *Id.* at 950. The Eighth Circuit thus did not even bother to state the language that was said to promise vested benefits. See *ibid.* (emphasis in original) (paraphrasing plan to state that "benefits *will be* provided until the retiree dies"). In contrast to the present case (see p. 2, *supra*), the plaintiffs in *SIPCO* adduced "overwhelming extrinsic evidence" that the employer actually "intended" that benefits "would vest," including testimony from the "President and Chief Executive Officer." *Id.* at 949-952.

[6] Plaintiffs admitted in their stay application in the Sixth Circuit (at 5) that the court of appeals did "not specify any particular formula that would guarantee that benefits would be rendered 'forever unalterable.'"

reserve the employer's right to amend the plan, however, is not presented in this case. As we have noted, the Sixth Circuit concluded that there was *no* vesting language or promise of permanent benefits in any GM SPD. As a consequence, the issue raised by plaintiffs could not be resolved in this case even if the courts were in conflict on the point.

In fact, however, there is no conflict among the circuits: the courts agree that, where a plan has been unilaterally created by an employer, without collective bargaining, an unambiguous reservation of the right to amend generally must control.[7] The cases cited by plaintiffs (at Pet. 13) are not to the contrary. Two of those cases (*Diehl* v. *Twin Disc, Inc.*, 102 F.3d 301 (7th Cir. 1996), and *Stewart* v. *KHD Deutz of America Corp.*, 980 F.2d 698 (11th Cir. 1993)) involve the interpretation of collective bargaining agreements and therefore are inapposite.[8] Claims in such cases arise under the Labor-Management Relations Act as well as under ERISA (see *Diehl*, 102 F.2d at 305; *Stewart*, 980 F.2d at 702), and the courts—including, most prominently, the Sixth Cir-

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[7] See, *e.g.*, *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 58 F.3d 896, 904 & n.11 (3d Cir. 1995) (citing cases); *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d 929, 938-939 (5th Cir. 1993).

[8] There can be no serious suggestion that the Seventh Circuit would disagree with the Sixth Circuit's disposition here since it has expressly followed the en banc decision in this case. See *Frahm* v. *Equitable Life Assurance Soc'y*, 137 F.3d 955, 956-961 (7th Cir. 1998) (rejecting claims of early retirees seeking "lifetime" medical benefits under contract, estoppel, and fiduciary duty principles). Moreover, *Diehl* is distinguishable because it did not involve a plan document that contained both lifetime benefits language and a reservation of the employer's right to amend the plan. Instead, *Diehl* involved two *separate* agreements that were negotiated years apart; the second agreement, which made the reference to vested benefits, superseded the earlier one, which reserved the employer's rights. See 102 F.3d at 307. The court thus expressly noted that its holding did not call into question the principle that, "when potentially conflicting provisions coexist within the same document, * * * [the] contractual provisions [should] be read as parts of an integrated whole," and reaffirmed that a reservation of rights "allows the employer to retroactively change the medical benefits of retired participants, even in the face of clear language promising company-paid lifetime benefits." *Ibid.*

cuit—have held that such claims are governed by special rules applicable to labor agreements that are relevant only "when attempting to discern the intent of the parties in the collective bargaining context." *Smith* v. *ABS Indus., Inc.*, 890 F.2d 841, 845 (6th Cir. 1989). See, *e.g.*, *Policy* v. *Powell Pressed Steel Co.*, 770 F.2d 609, 613-614 (6th Cir. 1985), quoting *UAW* v. *Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983) (discussing presumptions "'when the parties contract for benefits'"); *id.* at 613 (applying a presumption that "weigh[s] in favor of finding that retiree benefits survive expiration of the collective bargaining agreement"); *Stewart*, 980 F.2d at 702 (noting "the principle that the parol evidence rule should not be rigidly applied to labor contracts"). Cases applying such rules have no bearing here.[9]

The remaining decision cited by plaintiffs, *Barker* v. *Ceridian Corp.*, 122 F.3d 628 (8th Cir. 1997), likewise does not create a conflict on how to reconcile unambiguous reservation-of-rights provisions with express promises of vested benefits. In *Barker*, the employer's reservation of rights was *itself* ambiguous, and actually suggested that the plaintiffs' benefits *were* vested. See *id.* at 635-636. That holding (which found that a disability plan was vested while a medical plan was not) has no application in this case, where the Sixth Circuit found that the plan "*unambiguously* reserved GM's right to amend or terminate the plan." Pet. App. 20a (emphasis added). Indeed, the decision in *Barker* (see 122 F.2d at 635-637) expressly reaffirmed the approach stated in *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945, 950 (8th Cir. 1994), where the Eighth Circuit "agree[d] that a reservation-of-rights provision is inconsistent with, and in most cases would defeat, a claim of vested benefits." In the Eighth Circuit, as in the Sixth Circuit, the plaintiff's burden of proof of vesting is "not met by the employer's promise to provide welfare benefits 'until death of retiree' where

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[9] We argued below that cases involving collective bargaining agreements have no relevance in this setting. GM CA Op. Br. 15 n.7. As we also noted below, plaintiffs "effectively concede[d] this point, because they * * * made absolutely no response to our arguments" on the issue. GM CA Reply Br. 4 n.2. Because plaintiffs never attempted to convince the Sixth Circuit that collective bargaining decisions have any bearing here, they can hardly now argue that the holding below conflicts with such decisions.

the employer had expressly reserved the right to terminate or amend the plan." *Howe* v. *Varity Corp.*, 896 F.2d 1107, 1109-1110 (8th Cir. 1990). That is the rule applied by every circuit to address the issue.[10]

There is, in short, no conflict among the circuits on the vesting issue. The cases cited by plaintiffs involve factual situations far removed from this one. There is no reason to believe that any other court of appeals would differ from the Sixth Circuit on the *facts* presented here. No court has ever suggested that medical benefits are frozen and unchangeable where the employer has *unambiguously* reserved its statutory right to amend a unilaterally established medical plan in hundreds of thousands of formal plan documents and has regularly exercised that right, and where the evidence affirmatively shows the employer's unwavering intent to preserve that right. See *Spacek* v. *Maritime Ass'n*, 134 F.3d 283, 293-294 (5th Cir. 1998) (summarizing appellate case law) ("The strong weight of authority throughout the circuits indicates that, in the area of welfare benefits, which are not subject to ERISA's minimum vesting and accrual requirements, a general amendment provision in a welfare benefits plan is of itself sufficient to unambiguously negate any inference that the employer intends for employee welfare benefits to vest contractually, and thus become unalterable, after the employee retires").

2. Plaintiffs next contend (at Pet. 13-14) that the Sixth Circuit "decid[ed] that reservations [of the employer's amendment rights] in underlying plan documents 'trump' SPDs containing

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[10] *In re Unisys Corp. Retiree Med. Benefit Litig.*, 58 F.3d 896 (3d Cir. 1995), and *Chiles* v. *Ceridian Corp.*, 95 F.3d 1505 (10th Cir. 1996), cited at Pet. 13, do not state a contrary rule. In fact, *Unisys* expressly held that "[w]here * * * the reservation of rights is broad and unequivocal, it will prevail over a promise of lifetime benefits." 58 F.3d at 904 n.11. The *Chiles* court noted that "the weight of case authority supports the *Unisys* approach" but was able to reject a vesting claim without having to apply any "hard-and-fast" rule. 95 F.3d at 1512 & n.2. While plaintiffs (at Pet. 12) assert that *Barker* and *Chiles* have recognized confusion among the lower courts on this point, neither those decisions nor *any* other case arising outside of the collective bargaining context fails to give primacy to an *unambiguous* reservation-of-rights clause.

lifetime promises with no reservations," and that this purported holding conflicts with decisions of other courts. But this assertion rests on a plain misreading of the decision below. The Sixth Circuit most certainly did *not* hold that the underlying plan documents control when they are inconsistent with promises made in SPDs. Instead, as we have explained, the court began with the factual premise that GM's SPDs do not "stat[e] or even impl[y] that the plaintiffs' benefits were vested" (Pet. App. 22a-23a); on that factual basis, the court held that omission from some SPDs of a statement of GM's right to amend does not *itself* serve to vest benefits because "GM was not required to disclose in the summary plan descriptions that the plaintiffs' benefits were not vested." *Id.* at 22a. In the portion of the court's opinion that is misleadingly cited by plaintiffs (at Pet. 13), the Sixth Circuit explained that "GM's failure to include in some summaries *a notice of its right to change the plan* does not trump the clearly-stated right to do so in the plan itself." Pet. App. 21a (emphasis added).

That holding—that "[a]n *omission* from the summary plan description does not, by negative implication, alter the terms of the plan itself" (Pet. App. 21a (emphasis added))—states the rule in every circuit. The many cases cited by plaintiffs (at Pet. 14) are not to the contrary; they stand for the unexceptional proposition that the SPD controls when its statement of benefits *conflicts with* those in the underlying plan documents. Far from rejecting that rule, the court below expressly reaffirmed it, declaring that "'statements in a summary plan are binding and if such statements conflict with those in the plan itself, the summary shall govern.'" Pet. App. 19a, quoting *Edwards* v. *State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988). See *id.* at 21a ("the principle announced in *Edwards* does not apply to silence"). Beyond this, the cases cited in the petition consistently hold that retirees (such as plaintiffs) who have reasonable notice of underlying plan terms may not rely on an SPD to override those terms. *E.g.*, *Chiles* v. *Ceridian Corp.*, 95 F.3d 1505, 1518-1519 (10th Cir. 1996) (refusing to apply *Edwards* to create "windfall" recoveries where employees are on notice of true plan terms and cannot establish "reliance" and "prejudice" flowing from faulty plan descriptions). Plaintiffs' attempt to manufacture a conflict on this point therefore has no substance at all.

3. Third, plaintiffs take issue with the Sixth Circuit's passing statement that "the intent to vest 'must be found in the plan documents and must be stated in clear and express language,'" asserting that other courts allow rights to vest even when the plan is "ambiguous" on the subject of vesting. Pet. 14, quoting Pet. App. 19a. Again, the question whether ambiguous documents may give rise to vested rights simply is not presented here. The Sixth Circuit ruled that the GM plan is *not* ambiguous; it found that nothing in the plan documents or SPDs "even *implies* that the plaintiffs' benefits were vested" (Pet. App. 22a-23a (emphasis added)) and added that "the summary plan descriptions *un*ambiguously reserved GM's right to amend or terminate the plan." *Id.* at 20a (emphasis added). See *id.* at 26a-27a (estoppel claims rejected because plan and SPDs "unambiguously reserved to GM the right to amend or terminate the plan"). The Court therefore would have no occasion in this case to address the rules governing the construction of ambiguous plans.

In any event, plaintiffs' assertion of a conflict once again is insupportable. Most of the decisions that plaintiffs rely upon (at Pet. 15 & n.3) for the proposition that ambiguous plan documents may give rise to vested rights involve the interpretation of collective bargaining agreements; as we have explained, such cases involve special rules of construction that are inapposite here.[11] The

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[11] See *Bidlack* v. *Wheelabrator Corp.*, 993 F.2d 603, 604 (7th Cir. 1993) (suit based "primarily on section 301 of the Taft-Hartley Act"; ERISA "has little bearing on the issues in contention"); *International Ass'n of Machinists & Aerospace Workers* v. *Masonite Corp.*, 122 F.3d 228, 231, 233 (5th Cir. 1997) (citation omitted) (noting that "the rules of contractual interpretation are still applied with 'flexibility * * * in the context of labor contracts'"; reservation-of-rights clause that would control outside of collective-bargaining situation "cannot vitiate contractually vested or bargained-for rights"); *Stewart*, 980 F.2d at 702 ("[f]ederal substantive law governs the interpretation and enforcement of contracts covered by § 301(a) of the LMRA"; "the parol evidence rule should not be rigidly applied to labor contracts"); *United Paperworkers Int'l Union* v. *Champion Int'l Corp.*, 908 F.2d 1252, 1256 (5th Cir. 1990) ("provisions of a labor contract may be more readily expanded by implication than those of contracts memorializing other transactions"); *Bower* v. *Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984).

other opinions cited by plaintiffs apply interpretative rules that do not differ materially from the one alluded to by the Sixth Circuit in this case. While plaintiffs (at Pet. 15 n.3) cite *Alexander* v. *Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992), for the proposition that ambiguous plans may give rise to vested benefits, the Third Circuit (in an opinion written by the same judge who authored *Alexander*) more recently explained that vested rights "must be found in the plan documents and stated in clear and express language"; "[t]he plan participant bears the burden of proving, by a preponderance of the evidence, that the employer intended the welfare benefits to be vested." *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 58 F.3d 896, 902 (3d Cir. 1995). Similarly, the court in *Barker* (cited at Pet. 15 n.3) reaffirmed that "any promise to provide vested benefits must be 'incorporated, in some fashion, into the formal written ERISA plan,'" and that "employees carry the burden of showing an agreement or other demonstration of employer intent to vest benefits." 122 F.3d at 633, 634. And the holding of *Schonholz* v. *Long Island Jewish Med. Ctr.*, 87 F.3d 72 (2d Cir. 1996), cited at Pet. 14-15, addresses only the unusual situation where there are *no* formal plan documents or SPDs that could contain unambiguous vesting language.[12]

4. Plaintiffs gain nothing from vague references (at Pet. 15) to their estoppel and breach-of-fiduciary-duty claims. The petition

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[12] *Schonholz* noted the holdings of other courts "requiring that the employer's decision to vest benefits be set forth clearly in the plan documents" or indicating that "benefits could be vested by ambiguous language *in a collective bargaining agreement*." 87 F.3d at 78 (emphasis added). The Second Circuit distinguished those cases because in *Schonholz* the employer "created no such formal documents." *Ibid.* Even so, the court held that the plaintiff was obligated to "point to written language capable of reasonably being interpreted as creating a promise on the part of [the employer] to vest her severance benefits." *Ibid.* The Sixth Circuit found no such language here. It is settled law in the Second Circuit, reaffirmed in *Schonholz*, that an employer may amend its plan if it makes unambiguous reservations in formal plan documents. See *Moore* v. *Metropolitan Ins. Co.*, 856 F.2d 488 (2d Cir. 1988) (rejecting claims for vested benefits, notwithstanding "lifetime" language, where the employer reserved the right to amend in most formal plan documents).

does not take issue with the Sixth Circuit's estoppel holding that, "[i]n the face of GM's clearly-stated right to amend * * * reliance on statements allegedly suggesting the contrary was not, and could not be, reasonable or justifiable, especially when GM never told the plaintiffs that their benefits were vested or fully paid-up." Pet. App. 27a. Plaintiffs likewise do not challenge the Sixth Circuit's statement that no court of appeals has "impos[ed] fiduciary liability for a failure to disclose information that is not required to be disclosed" (*id.* at 30a)—or its unexceptionable holding that "GM's accurate representations of its current program" cannot "reasonably be deemed misleading." *Id.* at 31a. These claims accordingly would fail even if plaintiffs' contractual vesting theory had merit.

In sum, plaintiffs wholly disregard what the Sixth Circuit actually held in this case. They have not pointed to any decision that found benefits to be vested on a record even remotely similar to the one here. The cases cited by plaintiffs are not only factually distinguishable; they have no factual resemblance at all—turning on unique collective bargaining histories, unrelated plan documents, discrepant contractual language and expressions of intent, and plans (such as informal severance plans or disability plans) that differ fundamentally from the GM plan at issue here. Plaintiffs have not even attempted to establish that any other court would rule for them when—as the Sixth Circuit found to be true in this case—the employer did not "stat[e] or even impl[y] that the plaintiffs' benefits were vested" (Pet. App. 22a-23a) and "unambiguously reserved [its] right to amend or terminate the plan." *Id.* at 20a. Review of the vesting question therefore is unwarranted.

IV. The Sixth Circuit's Case-Specific Holding That Plaintiffs Were Not Promised Individual Medical Plans Creates No Conflict With The Law Of Other Circuits.

Plaintiffs contend (Pet. 16-19) that the Sixth Circuit's decision is in conflict with decisions of other courts of appeals on the question whether informal "bilateral early retirement agreements for free lifetime health care [are] enforceable under ERISA." Pet. i. But that question was not decided below. As the Seventh Circuit has observed, the en banc court "did not deny" that "bilateral contracts about welfare benefits are possible." *Frahm* v. *Equitable Life*, 137 F.3d 955, 958 (7th Cir. 1998). Rather, it held that GM's various informal, and often oral, communications did not as a

matter of fact create the innumerable "side agreements" or "individual plans" alleged by plaintiffs. The Sixth Circuit's disposition of that factual issue is obviously not worthy of this Court's review.

The Sixth Circuit found that GM's general statements regarding company-subsidized health care were accurate descriptions of *current* plan terms, not "promises" of new and different plans. The court explained that the statements were "undeniably true under the terms of GM's then-existing plan" (Pet. App. 29a). The court added that, given GM's repeated and "clearly-stated" notification of the company's right to amend, it "could not be reasonable or justifiable" to view the descriptions as promises, "especially when GM never told the plaintiffs that their benefits were vested or fully paid-up" (*id.* at 27a); "[n]either the GM plan itself nor any of the various summaries of the plan states or even implies that the plaintiffs' benefits were vested." *Id.* at 22a-23a. The court also found that "[n]one of GM's representations suggested" either "that the plan was being modified" through letters of acceptance memorializing retirement or that copayments or deductibles would be frozen at any particular level. *Id.* at 24a. In these circumstances, there is no factual predicate for plaintiffs' assertion that GM's informal, brief, and obviously incomplete summaries of existing plan terms created separate vested plans or "side agreements" for medical benefits.[13] The legal question plaintiffs wish to debate simply is not presented by the factual record or the opinion below.

In addition, as a matter of law, plaintiffs could not rely on informal and incomplete communications to override or supersede the terms of formal plan documents, which were widely distributed and which unambiguously reserved GM's right to amend. As the Sixth Circuit explained, this Court's decisions make clear that ERISA "'has an elaborate scheme in place for beneficiaries to learn their rights and obligations at any time, a scheme that is built

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[13] The various "statements of acceptance" signed by some early retirees "have nothing whatever to say about the health care plan." As the court of appeals recognized, "the context suggests" that the "benefits" referred to in these statements are "only * * * pension benefits." Pet. App. 25a n.12.

around reliance on the face of written plan documents'" (Pet. App. 23a), including "Summary Plan Descriptions" distributed to employees and "governing plan documents" made "available for inspection." *Curtiss-Wright*, 514 U.S. at 83-84. ERISA's written instrument requirement ensures "that every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan." *Id.* at 83. Plan administrators would face an impossible task if "occasional corporate communications" could take the place of "'the documents and instruments governing the plan.'" *Id.* at 82.

Contrary to plaintiffs' assertion, there is no conflict among the circuits as to these governing legal principles. The courts of appeals consistently have held that the terms of a complex medical plan, set forth in formal plan documents, may not be amended or superseded by informal communications, particularly highly abbreviated statements (in this case, a few sentences or phrases) that obviously describe only limited aspects of the formal plan. See, *e.g.*, *Gable*, 35 F.3d at 857 ("the fact that [the] documents referred to retirees' benefits as 'lifetime benefits' does not nullify the company's right to modify, because the [documents] are informal communications that do not govern the company's obligations under an ERISA plan"); *Moore* v. *Metropolitan Life Ins. Co.*, 856 F.2d 488, 489, 492 (2d Cir. 1988) (written statements referring to "'lifetime' benefits 'at no cost'" did not create vested benefits because "Congress intended that plan documents and the SPDs exclusively govern an employer's obligations under ERISA plans"); accord *In re Unisys Corp. Retiree Med. Benefit Litig.*, 58 F.3d 896, 902 (3d Cir. 1995); *Pierce* v. *Security Trust Life Ins. Co.*, 979 F.2d 23, 27 (4th Cir. 1992); *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d 929, 937-938 (5th Cir. 1993); *Borst* v. *Chevron Corp.*, 36 F.3d 1308, 1323 (5th Cir. 1994); *Pisciotta* v. *Teledyne Indus.*, 91 F.3d 1326, 1329, 1331 (9th Cir. 1996); *Chiles* v. *Ceridian Corp.*, 95 F.3d 1505, 1511 (10th Cir. 1996); *Peckham* v. *Gem State Mut.*, 964 F.2d 1043, 1050 n.13 (10th Cir. 1992); *Alday* v. *Container Corp.*, 906 F.2d 660, 665 (11th Cir. 1990); see also *Frahm*, 137 F.3d at 957-961 (explicitly following the Sixth Circuit's analysis in this case).

The cases that plaintiffs claim (Pet. 17) are in conflict with the Sixth Circuit's ruling are factually and legally inapposite.

Plaintiffs cite *Donovan* v. *Dillingham*, 688 F.2d 1367 (11th Cir. 1982), and its progeny for the proposition that an ERISA plan may sometimes be established without satisfying all ERISA-mandated formalities, provided that "the surrounding circumstances" enable "a reasonable person [to] ascertain the intended benefits" and other key terms. But informal statements that GM would provide retirees with "basic health care coverages" at GM's expense say nothing about the level of those coverages or their terms and conditions, and the written acceptances of early retirement say nothing at all about any medical care plan. As a matter of *fact*, these informal statements fail to satisfy the *Dillingham* requirement, as the Sixth Circuit recognized.

More fundamentally, the cases plaintiffs rely on recognize that an ERISA plan may be created informally where either there is *no* existing formal plan covering the same type of benefits (*Dillingham*, 688 F.2d at 1370; *Kenney* v. *Roland Parsons Contr. Corp.*, 28 F.3d 1254, 1258 (D.C. Cir. 1994); *Grimo* v. *Blue Cross/Blue Shield*, 34 F.3d 148, 150-152 (2d Cir. 1994); *Memorial Hosp.* v. *Northbrook Life Ins. Co.*, 904 F.2d 236, 240-241 (5th Cir. 1990); *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503-1504 (9th Cir. 1985)) or the informal plan extends the *same* coverage as an existing formal plan to a person who is not covered by that plan. *Miller* v. *Taylor Insulation*, 39 F.3d 755, 760 (7th Cir. 1994). None of those cases even suggests that informal representations may replace or "override the clear terms" of an existing formal plan that covers the same type of welfare benefits. Pet. App. 27a.

Indeed, far from having "rejected the *Dillingham* test" (Pet. 17), the Sixth Circuit has repeatedly applied it. *E.g.*, *Olejniczak* v. *Industrial Mach. & Die*, 106 F.3d 401 (Table), 1997 WL 14776, at *4 (6th Cir. 1997) ("This Circuit [has] adopted the *Dillingham* approach for determining whether an employer has established an employee benefit plan"); *Brown* v. *Ampco-Pittsburgh Corp.*, 876 F.2d 546, 551 (6th Cir. 1989). But on facts like those involved here, the "*Dillingham* approach" is simply inapplicable. Confirming this, the Eleventh Circuit has consistently held that informal written and oral statements cannot override formal plan documents—without discerning any tension between that rule and its

Dillingham decision. *Alday*, 906 F.2d at 665-666; *Nachwalter* v. *Christie*, 805 F.2d 956, 960 (11th Cir. 1986).

Nor, as plaintiffs maintain (Pet. 18 & n.4), is there any inconsistency between the Sixth Circuit's ruling and cases recognizing "the enforceability of single-employee ERISA plans" in certain circumstances. *Cvelbar* v. *CBI*, 106 F.3d 1368 (7th Cir. 1997), gave effect to a written agreement that granted severance benefits in the event of termination. Far from overriding the terms of a formal group medical plan, the severance plan there at issue stated that the "terms and conditions of such coverage were contained in the First Peoria Corp. Retirement Plan." *Id.* at 1379. The court ultimately sustained the employer's decision to terminate benefits altogether. *Id.* at 1380. Similarly, *Williams* v. *Wright*, 927 F.2d 1540, 1542 n.3 (11th Cir. 1991), gave effect to a written agreement with a retiring employee to continue to pay his premiums "on the company's group medical insurance plan." And in *Hamilton* v. *Air Jamaica*, 945 F.2d 74, 77-79 (3d Cir. 1991), the court concluded that a severance pay plan was officially embodied in the "employee handbook" given to all employees. The court stressed that such a formal plan document could not be modified through informal communications and that the employer's reservation of the right to amend or terminate must be given full effect. *Ibid.* "Air Jamaica's employees are on notice that they have no guaranteed benefits." *Id.* at 78. "Employers are understandably more willing to provide employee benefits when they can reserve the right to decrease or eliminate those benefits." *Id.* at 79. In *Frahm*, the Seventh Circuit followed the Sixth Circuit's decision here, refusing to hold that "oral statements and letters" during discussions about retirement created "individual contracts * * * establishing rights on top of those created by [a formal] health benefits plan." 137 F.3d at 957-961.

In sum, not one of the cases that plaintiffs claim are in conflict with the Sixth Circuit's ruling even suggests that tens of thousands of employees are entitled to rely on their own personal interpretations of informal and obviously incomplete communications to override the explicit terms of a formal medical plan, or to splinter a complex medical plan into innumerable individual pieces. As the en banc court explained (Pet. App. 25a), acceptance of plaintiffs' unprecedented claim would subvert Congress's purpose

in passing ERISA. Congress recognized that impractical vesting requirements would cause employers to respond by "decreasing benefits under existing plans or slowing the rate of formation of new plans." This was the opposite of the "broader use" of employee welfare plans that Congress wished to achieve:

> [S]ince these plans are voluntary on the part of the employer * * * it is necessary to take into account additional costs from the standpoint of the employer. If employers respond to more comprehensive coverage, vesting and funding rules by decreasing benefits under existing plans or slowing the rate of formation of new plans, little if anything would be gained from the standpoint of securing broader use of employee pensions and related plans.

H.R. Rep. No. 93-807, 93d Cong., 2d Sess. 15 (1974); see note 3, *supra*. Because Congress intended employers to be "free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans" (*Curtiss-Wright*, 514 U.S. at 78), the en banc court correctly determined that GM's informal communications could not reasonably be understood to fragment the GM plan into a multitude of individual plans that were perpetually frozen and unamendable.[14]

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[14] Plaintiffs suggest in passing that GM did not properly embody its medical plan in formal plan documents. Pet. 14 n.2. The reason the Sixth Circuit did not review the district court's finding that GM adequately embodied its plan in formal documents is that plaintiffs deliberately *waived* this argument. See Pet. App. 10a n.4, 14a n.7, 96a. Plaintiffs' argument is in any event baseless. GM originally embodied its health care plan in insurance policies and insurance certificates (C.A. App. 1947-2024). When GM became self-insured, it embodied the plan in a lengthy formal document that was filed with the Internal Revenue Service. *Id.* at 1438-1692, 644, 700, 1418, 1936. That plan explained that it applied to "salaried employees" (*id.* at 1438), provided in detail how it would be funded and administered, and specified what benefits would be paid to employees and retirees. Additional details were repeated in the summary plan descriptions, including GM's right to "amend, modify, suspend, or terminate its benefit Plans or Programs by action of its Board of Directors." *Id.* at 1417, 1419, 1935, 1938, 2029-2034. These fact-bound issues, which are not mentioned in the questions presented in the petition, are plainly unworthy of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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